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Supreme Court of the United States

October Term, 1970

No. ...., 596

ALFRED MELVIN FELDSTEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BURTON MARKS
9720 Wilshire Boulevard
Beverly Hills, California 90212
Telephone - (213) 278-2301

Attorney for Petitioner

Offset printed by: Dean-Standefer Co., 322 Main, Huntington Beach, Ca.
(714) 536-7161

TOPICAL INDEX

	Page
Petitioner prays for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
1. Where error of constitutional dimension has admittedly occurred, is it constitutionally permissible for a reviewing court to construe the record "most favorably to the government" (Appendix "A" p. 2) in order to affirm a conviction?	2
2. Was the admitted error in the trial court (instructing the jury on the "*Leary*" presumption) harmless beyond a reasonable doubt in this case?	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting Petition for Certiorari	5
1. To secure uniformity of decisions and methods of review by Circuit Courts, in that the court below used an impermissible standard in its method of review, and in so doing, conflicted with other Courts of Appeals and with this Court's decisions of *Chapman v. California*, 386 U.S. 18, and *Harrington v. California*, 395 U.S. 250	5
2. To decide new and important questions of law:	

TOPICAL INDEX

Page

a. To declare that (constitutionally) erroneous instructions to the jury which might have contributed to the verdict can never be considered harmless beyond a reasonable doubt even though it may be permissible to construe the record most favorably to the government; 11

and

b. To declare what objective criteria should be considered by a reviewing court in order to make a determination "beyond a reasonable doubt" that the constitutional error did not contribute to a verdict (where the evidence is conflicting on crucial matters, it can never be considered "overwhelming" in favor of a verdict of conviction in the face of a constitutional error) 12

Conclusion 16

TABLE OF AUTHORITIES CITED

Cases

Anderson v. Nelson, 390 U.S. 523 (1968) 7, 14
(see Wilson v. Anderson)

Bollenbach v. United States, 326 U.S. 607 (1945) . . 13, 14

Chapman v. California, 386 U.S. 18 (1967) .....
..... 5, 6, 7, 11, 12, 13, 14

Fahy v. State of Connecticut, 375 U.S. 85 12

TABLE OF AUTHORITIES CITED

Cases (cont'd) — Page

Gillison v. United States, 399 F.2d 586 (D.C. Cir. 1968) 11

Government of the Virgin Islands v. Bell, 392 F.2d 207 (3 Cir. 1968) 10, 11

Haller v. Robbins, 409 F.2d 857 (1 Cir. 1969) 11

Harrington v. California, 395 U.S. 250 (1969) 5, 6, 7, 11

Hooper v. Swenson, 401 F.2d 352 (8 Cir. 1968) 11

Leary v. United States, 395 U.S. 6 (1969) 3, 6, 15

Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967) 11

Pearson v. United States, 389 F.2d 684 (5 Cir. 1968) 11

Rosenthal v. Henderson, 389 F.2d 514 (6 Cir. 1968) 15

Street v. New York, 394 U.S. 576 (1969) 16

Stromberg v. California, 283 U.S. 359 (1931) 15

United States v. Hayward, 420 F.2d 142 (D.C. Cir. 1969) 15

United States v. Lookretis, 398 F.2d 64 (7 Cir. 1968) 10

United States v. Reynolds, 416 F.2d 951 (7 Cir. 1969) 16

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Wilson v. Anderson, 379 F.2d 330 (1967) rev'd sub nom. Anderson v. Nelson, 390 U.S. 523 (1968)	7, 14
Wood v. Crouse, 417 F.2d 394 (10 Cir. 1969)	10

Statutes

United States Code

Title 19 Sections 1459, 1461, 1484, 1485	4
Title 21 Section 176a	2, 3, 15
Title 28 Section 1245(1)	2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner hereby prays for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the trial court as to him.

OPINIONS BELOW

Petitioner was convicted after a jury trial; judgment was

entered thereon June 24, 1966. On appeal, the United States Court of Appeals for the Ninth Circuit filed its decision on June 22, 1970, and a rehearing was denied on July 27, 1970. The decision of the Ninth Circuit Court of Appeals, together with the dissenting opinion of Circuit Judge Walter Ely, is attached to this petition as Appendix "A."

JURISDICTION

This suit was originally brought in the United States District Court for the Southern District of California. Jurisdiction was based upon an indictment charging a violation of a federal statute, Title 21, U.S.C., section 176a. The questions sought to be presented here were raised at the first available instance in the courts below, including questions raised before the Court of Appeals, and in the petition for rehearing filed in that court. This Court's jurisdiction is invoked under Title 28, U.S.C., section 1245(1).

QUESTIONS PRESENTED

The following questions are presented for determination by this Court:

1. Where error of constitutional dimension has admittedly occurred, is it constitutionally permissible for a reviewing court to construe the record "most favorably to the government" (Appendix "A" p. 2) in order to affirm a conviction?

2. Was the admitted error in the trial court (instruct-

ing the jury on the "*Leary*" presumption) harmless beyond a reasonable doubt in this case?

STATUTE INVOLVED

Section 176a of Title 21, United States Code, provides in pertinent part:

> ". . . whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, . . . or in any manner facilitates the transportation [or] concealment . . . of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, . . . " shall be guilty of an offense against the United States.
>
> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.
>
> " . . . "

STATEMENT OF THE CASE

Petitioner was convicted, after a jury trial, of three different offenses arising under 21 U.S.C. 176a. In count 1 of the indictment he and two others, Dodds and Ollendorf, were charged with aiding and abetting a fourth person, Rosciano, in smuggling marijuana into the United States from Mexico. Count 2 charged petitioner, Dodds and Ollendorf with aiding and abetting Rosciano in concealing and facilitating the transportation and concealment of the marijuana. Count 3 charged petitioner and the other three with conspiring to bring marijuana into this country without presenting it for inspection or declaring it, as 19 U.S.C. sections 1459, 1461, 1484 and 1485 require, and conspiring to conceal and facilitate the transportation and concealment of marijuana brought into the United States contrary to law.

Petitioner was the only one of the four to stand trial. The other three named defendants testified for the prosecution.

In summary, according to the prosecutor's opening statement (Transcript of Record on Appeal, pages 40, *ff* —hereafter Transcript page references will be preceded by "TR"), certain packages of marijuana were brought into the United States from the Tijuana, Mexico area on January 7, 1966 by Rosciano, apparently in an auto rented by petitioner in Los Angeles (TR 41). It was alleged that petitioner had earlier paid over money for the marijuana, but this payment was returned almost entirely by Ollendorf (TR 42). On January 6 a discussion took place in the apartment occupied by petitioner and Dodds, following

which Dodds and Ollendorf went to Mexico, bought the marijuana and turned it over to Rosciano for transportation into this country (TR 43). On January 7 Rosciano drove the car containing the marijuana across the border near Tijuana, was stopped and arrested, the marijuana being confiscated almost immediately after the crossing (TR 44).

At all times during the purchase, handling and transporting of the marijuana petitioner was in Los Angeles, more than 125 miles away from these activities. Moreover, at no time from the departure of the other three from Los Angeles to Mexico, through the purchase, handling, transporting and seizure of the marijuana by customs agents were any of the three in contact with petitioner. Pertinent facts which illuminate the points allegedly involving the petitioner with these activities– the money payment, the car rental and the discussion– will be noted at length in petitioner's reasons for granting this petition.

REASONS FOR GRANTING PETITION FOR CERTIORARI

1. **To secure uniformity of decisions and methods of review by Circuit Courts, in that the court below used an impermissible standard in its method of review, and in so doing, conflicted with other Courts of Appeals and with this Court's decisions of *Chapman v. California*, 386 U.S. 18, and *Harrington v. California*, 395 U.S. 250.**

In affirming petitioner's conviction, the Court of Appeals for the Ninth Circuit reviewed the record and stated the facts "most favorably to the government" (Appendix "A" p. 2). Petitioner contends that this method and the standard it reflects are inconsistent with the clear mandate of this Court as expressed in *Chapman v. California*, 386 U.S. 18 (1967), and *Harrington v. California*, 395 U.S. 250 (1969).

After admitting (Appendix "A" p. 5) that petitioner's "conviction must be reversed and a new trial ordered" on the basis of constitutional error at petitioner's trial of the type condemned in *Leary v. United States*, 395 U.S. 6 (1969), the court below recognized that the *Chapman* and *Harrington* test must be satisfied before petitioner's conviction could be upheld. In both *Chapman* and *Harrington* this Court held that "before a federal constitutional error can be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt," 386 U.S. at 24, 26; 395 U.S. at 251.

In applying this standard, this Court made it clear that "constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show it was harmless," 386 U.S. at 24. However, the court below in the instant case construed the record "most favorably to the government," thus shifting the burden of showing that the error was harmless from the prosecution, where this Court correctly has dictated it belongs, and presuming every fact necessary to sustain the prosecution's burden against the petitioner.

Petitioner respectfully contends that this method of reviewing admitted constitutional error is clearly erroneous, and that it constitutes a mistake of such proportions that to sanction it would be to approve a method by which the vital protections carefully erected by this Court in *Chapman* and *Harrington* could easily be neutralized.

This danger is aptly illustrated in petitioner's case. The court below did not, in its opinion, even consider the probable impact of that testimony on the jury. This is in marked contrast to the method employed by this Court in *Chapman* and *Harrington*. In the latter case, this Court carefully reviewed the testimony against Harrington, concluded that the erroneously admitted testimony was "cumulative," and declared the error to be harmless because "the case against Harrington was so overwhelming . . . ," 395 U.S. at 254. Petitioner also calls the Court's attention to *Wilson v. Anderson*, 379 F.2d 330 (1967), *rev'd sub nom. Anderson v. Nelson*, 390 U.S. 523 (1968), which Circuit Judge Ely, in dissenting from the opinion below, cites for his cogent contention "that it is a rare case indeed when error of constitutional magnitude can be held, beyond a reasonable doubt, not to have prejudicially affected the rights of an accused" (Appendix "A" p. 9).

Petitioner respectfully argues that this is not one of those rare cases, that the court below, had it not construed the record "most favorably to the government," could not have found the case against petitioner so overwhelming as to find the admitted error harmless, as a cursory review of the facts as seen by the court below shows.

The court states that petitioner "paid $1800 to Ollendorf to be used by Ollendorf to buy marihuana in Mexico for Feldstein and Dodds" (Appendix "A" p. 2). This was very much debated at the trial. Dodds' testimony about this was impeached with a prior statement made to a customs agent in New York. He told the agent that he, not petitioner, had given Ollendorf not $1800 but $2800 (TR 192, 193). Ollendorf, to whom the money was allegedly given, testified that he received it from one Sampson, not from petitioner (TR 177, see also TR 174).

The court below states that the money was returned to petitioner and Dodds (Appendix "A" p. 2). Ollendorf testified that he gave the money back to *Dodds*, not petitioner (TR 177), and even Dodds testified that most of the money was his (TR 89).

The entire "plan" for the trip to Mexico, from the testimony in the record, was not as the court below describes it. It is clear that it was not, as set forth in the court's opinion (Appendix "A" p. 2), "agreed that Rosciano . . . would receive the marihuana . . . and bring it across the border . . . " (TR 155). Dodds himself testified that the "first alternative" was not to have Rosciano drive the car across the border but to have someone else do it (TR 197). Furthermore, it is not even clear from the record that it was Dodds' car which was taken by Dodds and Ollendorf to Mexico. Dodds had told the customs agent in New York that it was Ollendorf's car and found himself impeached with this statement (TR 194).

The court below states that it was "undisputed that

Feldstein had obtained the car Rosciano used, and turned it over to him" (Appendix "A" p. 3). However, the court does not state the fact that petitioner Feldstein had only borrowed the car for *one* day, even though the trip to Mexico, as he knew, took *two*. Moreover, the court omits the equally contested fact that petitioner called the agency that loaned him the car, when it could not be returned on time (TR 57), and that after he discovered that the car had been confiscated, offered to take full responsibility for it (TR 58).

In addition, it is important to note, as the court below did not, that Dodds admitted being the initiator of all smuggling plans (TR 91, 109); that Rosciano was Dodds' long-time friend (TR 152); and that Rosciano had been made a part of the smuggling plans on the invitation of Dodds (TR 98). Ollendorf, who accompanied Dodds to Mexico, had met petitioner only a month before the unsuccessful attempt to bring the marijuana across the border (TR 173).

Finally, and especially significant, Dodds, Rosciano and Ollendorf all testified against petitioner because of hopes and assurances of shorter sentences or other benefits. Dodds was given a tax count in exchange for his testimony implicating petitioner and had not offered to testify prior to the arranged "deal" (TR 92, 93, 94, 109, 190). Ollendorf, a heroin addict (TR 177), hoped charges would be reduced against him (TR 180), and it appears was in trouble with the police before this incident. Ollendorf may well have been working as an informer in exchange for his freedom (see TR 174, 176), and thus been under an obligation to implicate others. Rosciano,

who had shortly before been released from prison after incarceration because of an identical charge (TR 151), obviously benefited as well from his cooperation in convicting petitioner.

Thus, if the presumption against petitioner is thrown out for the error that it is, and if the facts are not read "most favorably to the government," which reading is an improper shifting of the prosecution's burden, it becomes, at best, extremely difficult to say what the jury might have thought and, surely, impossible to conclude that the error was harmless beyond a reasonable doubt.

The court below is in conflict, at least in principle, with other Courts of Appeals in its construing the record in this case in a manner most favorable to the government.

As the Court of Appeals for the Tenth Circuit noted in *Wood v. Crouse*, 417 F.2d 394 (10 Cir. 1969), at 399, not only has the prosecution "at the very least" failed to shoulder its burden of showing the error harmless beyond a reasonable doubt, but even in its "appellate brief [it] does not discuss or in any way refer to the harmless error issue."

In a case in the Seventh Circuit, *United States v. Lookretis*, 398 F.2d 64 (7 Cir. 1968), at 65, the government has conceded "that the 'harmless-constitutional-error rule' promulgated in *Chapman* . . . is subject to a limitation that once a constitutional infraction has been shown the government must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

In the Third Circuit, the court in *Government of the*

Virgin Islands v. Bell, 392 F.2d 207 (3 Cir. 1968), reversed a conviction with the holding that the fact that a jury may have been influenced by error was "not rebutted by the government" (at 210).

In addition, the First, Fifth, Eighth, and District of Columbia Circuit Courts of Appeals have all held that *Chapman* requires that the prosecution must prove any error harmless, which holdings conflict with the action of the court below regarding the reading of the record in petitioner's case. See: *Haller v. Robbins*, 409 F.2d 857 (1 Cir. 1969) at 860; *Pearson v. United States*, 389 F.2d 684 (5 Cir. 1968) at 688; *Hooper v. Swenson*, 401 F.2d 352 (8 Cir. 1968) at 356; *Gillison v. United States*, 399 F.2d 586 (D.C. Cir. 1968) at 588; *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967) at 247.

Petitioner respectfully urges that the court below is not only in conflict with, but, by the weight of authority of the eight cases just cited on this point, distinctly in error concerning, the applicable standard the harmless error test of *Chapman* and *Harrington* requires.

2. To decide new and important questions of law:

a. To declare that (constitutionally) erroneous instructions to the jury which might have contributed to the verdict can never be considered harmless beyond a reasonable doubt even though it may be permissible to construe the record most favorably to the government; and

b. To declare what objective criteria should be considered by a reviewing court in order to make a determination "beyond a reasonable doubt" that the constitutional error did not contribute to a verdict (where the evidence is conflicting on crucial matters, it can never be considered "overwhelming" in favor of a verdict of conviction in the face of a constitutional error).

Even if the court below can be said to have legitimately reviewed the record despite its admitted bias for the government's version of what transpired, petitioner contends that the record in this case cannot support a finding of harmless error. In this regard petitioner is compelled to quote this Court's decision in *Chapman*, at 24:

> "There is little, if any, difference between our statement in *Fahy v. State of Connecticut* [375 U.S. 85] about 'whether there is a *reasonable possibility* that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reason-

able doubt." (Emphasis added.)

The court below, using its facts, found the error in this case to be harmless because (Appendix "A" pp. 6 & 7):

> "The jury could not have found possession if it did not believe the testimony showing that Feldstein supplied the money and the car, pursuant to the plan, and for the purpose of carrying it out, and thus, although he never left Los Angeles, was in sufficient control of the maneuvering of the three other conspirators, and particularly of Rosciano, to have constructive possession. This same evidence, if believed, as it must have been for the jury to convict, also shows knowledge and intent on Feldstein's part that the marihuana would be acquired in Mexico, would be smuggled into the United States, and would then be concealed and transported in the United States."

This statement first assumes that the jury was entirely rational and logical in its deliberations, despite the erroneous and confusing instructions, and, second, that the court below has determined precisely what went on in the minds of each of the twelve jurors. It requires two such assumptions to view the circumstances of this case as not presenting a "reasonable possibility" that the error here was prejudicial. Further, these assumptions are made despite "how little is impirically known about the workings of a jury" (Justice Harlan, dissenting in *Chapman*, at 56) and despite the requirement that it is the prosecution's burden to prove what the court assumes. This Court's words in *Bollenbach v. United States*, 326 U.S. 607 (1945), at 614, are especial-

ly appropriate on this point:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

It is manifest that in petitioner's case such standards and procedures have not been satisfied. Indeed, the rationale of the court below is surprisingly akin to that used in *Wilson v. Anderson*, 379 F.2d 33 (9th Cir. 1967). This Court, in reversing *Anderson v. Nelson*, 390 U.S. 523 (1967), at 525, noted that the fact that the defendant in that case "did not flee the country could be viewed as casting doubt on the prosecution's case," perhaps on (an adverse witness's) veracity. Petitioner's case reveals many facts which a jury, unburdened by an unconstitutional presumption, could view as "casting doubt on the prosecution's case." As noted above, all the adverse witnesses were motivated, by failure to prosecute or prosecution on lesser charges, to testify against petitioner; their testimony was contradictory in key respects; and petitioner did not attempt to hide his connection with the car used to smuggle the contraband. These are merely the principle facts which cast doubt on the prosecution's case. Compare further the evidence against the defendants in *Chapman*, at 54-55. Compare also the rejection of a test which looks

only to "sufficient evidence to convict without that which is challenged," in *Rosenthal v. Henderson*, 389 F.2d 514 (6th Cir. 1968), at 516.

Petitioner stresses that the jury in his case could have believed some of what the prosecution witnesses said without believing it all. Yet, because of the instruction under 21 U.S.C. 176a, and the constructive possession instruction, the jury could have convicted petitioner solely because he unwittingly–though admittedly–supplied the car used to smuggle the marijuana. It is important to note that the prosecution in both opening and final argument to the jury touched upon petitioner's responsibility for the car (TR 259, 291). Petitioner emphasizes that the only matter to be resolved by the jury was his knowledge and intent. He did not deny that he rented the car or that Rosciano attempted to use the car to smuggle marijuana into the United States. The erroneous instruction dealt with just this element of the case, and the prosecution, as the court below admits, relied entirely on this instruction. Compare the attitude toward erroneous instructions demonstrated in *United States v. Hayward*, 420 F.2d 142 (D.C. Cir. 1969) at 145, and *Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968) at 122.

Finally, petitioner points out that:

> "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of *any* of the theories requires that the conviction be set aside. See, *e.g.*, *Stromberg v. California*, 283 U.S. 359 (1931)."
>
> *Leary v. United States, supra*, 395 U.S. 6 (1969) at 31-32. (Emphasis added.)

This rule of law has been reaffirmed in *Street v. New York*, 394 U.S. 576 (1969). It must be stressed that the *only* theory upon which petitioner's case was presented to the jury was unconstitutional. Compare the approach of the court below with *United States v. Reynolds*, 416 F.2d 951 (7th Cir. 1969).

CONCLUSION

For the reasons above set forth, a Writ of Certiorari should issue to review (and reverse) the judgment and opinion of the Court of Appeals.

Respectfully submitted,

BURTON MARKS, ESQ.

Attorney for Petitioner

APPENDIX "A"

OPINION OF THE COURT BELOW

APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

ALFRED MELVIN FELDSTEIN, Appellant, vs. UNITED STATES OF AMERICA, Appellee.

No. 22,344.

FILED June 22, 1970.

Appeal from the United States Court for the Southern District of California.

Before: BARNES, DUNIWAY and ELY, Circuit Judges.

DUNIWAY, Circuit Judge:

In a jury trial, Feldstein was found guilty of three different offenses, each arising under 21 U.S.C. § 176a. In count 1 of the indictment, he, Dodds and Ollendorf, were charged with aiding and abetting one Rosciano in smuggling marihuana into the United States from Mexico. In count 2, he and the same two persons were charged with aiding and abetting Rosciano in concealing and facilitating the transportation and concealment of the same quantity of marihuana, which had been imported into the United States contrary to law. In count 3, Feldstein, Rosciano, Dodds and Ollendorf were charged with conspiring to import and bring marihuana into the United States without presenting it for inspection or entering and declaring it, as required by 19 U.S.C. §§ 1459, 1461, 1484 and 1485, and to conceal and facilitate the concealment and transportation of marihuana brought into the United States contrary to law. Feldstein was sentenced to ten

years on each count, all three sentences being concurrent, and to a fine of $10,000 on each of counts 1 and 2, a total of $20,000. The assignments of error affect all three counts.

Feldstein was tried alone; the other three named defendants testified for the government. Stated most favorably to the government, the facts, as shown in their testimony, are these: Feldstein and Dodds shared an apartment in Los Angeles in December, 1964 and January, 1965. In December, while Dodds was away, Feldstein paid $1800 to Ollendorf to be used by Ollendorf to buy marihuana in Mexico for Feldstein and Dodds. Dodds did not trust Ollendorf. On about January 1 or 2, 1965, after Dodds had returned and learned what Feldstein had done, these three men met at the Los Angeles apartment. Ollendorf returned $1250 of the money to Feldstein and Dodds. At another meeting, it was agreed that Dodds and Ollendorf would proceed to Mexico on January 6, in Dodds' car, and buy marihuana from a source in Mexico known to Ollendorf. It was also agreed that Rosciano would meet them in Tijuana, Mexico, and would receive the marihuana from them and bring it across the border and back to Feldstein in Los Angeles in a different car, furnished by Feldstein. Feldstein, using a false name, obtained a car from a car-rental agency in Los Angeles, and turned it over to Rosciano. The plan was carried out. Dodds and Ollendorf drove, in Dodds' car, to Mexico, brought the marihuana, and put it in the trunk of that car. Rosciano drove to Mexico in the car furnished by Feldstein. The three men met at the appointed place, in Tijuana, drove out of town to a secluded spot, removed the marihuana from Dodds' car, and concealed it in the rented car. Rosciano, driving that car, proceeded to the border.

Dodds and Ollendorf did not accompany him. When Rosciano drove across the border into the United States in the rented car, he was stopped at the United States Customs Station, the car was searched, and the marihuana was found concealed in it.

It is undisputed that Rosciano did smuggle the marihuana into the United States and conceal and transport it after it was brought into the United States. It is also undisputed that Feldstein had obtained the car that Rosciano used, and turned it over to him. If the testimony of Dodds, Ollendorf and Rosciano is believed, it is also clear that Feldstein, Dodds and Ollendorf aided and abetted Rosciano in committing these offenses, and that all four men conspired to commit them. The same evidence, if believed, demonstrates beyond peradventure that Feldstein had the necessary knowledge and intent that the marihuana was to be imported into the United States from Mexico and was to be transported and concealed in this country. On the other hand, if these witnesses' testimony is not believed, the government had no case against Feldstein.

In its instructions, the court told the jury that it must find specific intent on the part of Feldstein, that a necessary element of the offense charged in count 1 was that Feldstein knowingly caused the importation of the marihuana, that a necessary element of the offense charged in count 2 was that Feldstein knew that the marihuana had been imported into the United States contrary to law, and that as to count 3, a necessary element was that Feldstein knew that the marihuana was to be brought into the United States contrary to law. Furthermore, in defining aiding and abetting, the court told the jury that it must find that Feldstein personally had knowledge of the fact that the marihuana had been illegally imported.

1. **The presumption in § 176a.**

If ever there was a case in which the so-called presumption contained in section 176a was not needed by the government to obtain a conviction, this is that case. Nevertheless, for reasons that escape us, government counsel requested, and the court gave, elaborate instructions regarding the presumption and defining possession. Feldstein's counsel objected, albeit not too forcefully, his principal ground being that there was no possession by Feldstein.

In its instructions about the presumption, the court first read to the jury the pertinent language of section 176a. It then proceeded to embroider on that language. It defined constructive possession as knowingly having the power and the intent to exercise dominion and control, either directly or through another person, and stated that if the jury found that Feldstein had constructive possession, that would bring him within the word "possession" as used in the statutory presumption. It then said that the statute makes it unnecessary for the government to offer any evidence in support of the charge as to the defendant's knowledge, if it shows that the defendant was in constructive or actual possession of the marihuana. It continued by saying that if possession was established, it became incumbent upon the defendant to go forward with the evidence and show that he came into possession of the marihuana legally. It further said that to rebut the presumption the defendant must show by satisfactory proof that the possession did not involve a violation of the statute, either because the substance was not imported contrary to law or because he had no knowledge of unlawful importation, and that if possession is shown, the explanation offered must not only be believed by the jury, but must be one that shows

that the possession was lawful under the statute. "Such explanation serves no purpose if it shows guilty knowledge by the defendant offering such explanation."

In *Leary v. United States*, 1969, 395 U.S. 6, the Supreme Court struck down the section 176a presumption insofar as it relates to the knowledge of the defendant that the marihuana was illegally imported. In *Scott v. United States*, 9 Cir., 1970, ... F.2d ..... (No. 23,119, March 6, 1970) we held that this aspect of the *Leary* decision is fully retroactive. Under these circumstances, Feldstein's conviction must be reversed and a new trial ordered, unless we can say, beyond a reasonable doubt, that the giving of the instructions as to the presumption was harmless. *Chapman v. California*, 1967, 386 U.S. 18; *Harrington v. California*, 1969, 395 U.S. 250. As we have previously indicated, the government quite unnecessarily risked a reversal by asking for instructions based upon the presumption in a case in which its own evidence directly shows the necessary knowledge and intent. Not only that, but the instructions proposed and given go beyond the presumption as written in the statute, and, if the presumption were valid, might still amount to prejudicial error. See, *e.g.*, *United States v. Christion*, 9 Cir., 1970, ... F.2d ....., (No. 24,373, May 14, 1970); *Chavez v. United States*, 9 Cir., 1965, 343 F.2d 85, 89; *United States v. Llanes*, 2 Cir., 1967, 374 F.2d 712, 715-16. However, Feldstein's counsel did not specifically object to these instructions as misstating the law as it was embodied in section 176a. His objection was general, and based on his contention that Feldstein did not have possession at all.

Strange to say, government counsel, in arguing to the jury, did not urge that the government's evidence directly showed

the required knowledge and intent on the part of Feldstein. As to this element of the case, he relied entirely upon the presumption and upon the court's definition of constructive possession. The major part of his argument was a summarization of the testimony of the government's witnesses and an argument as to why the jury should believe them. Similarly, defense counsel did not argue that if the witnesses were believed the government still had not proved either the necessary knowledge and intent or constructive possession, or that possession had been explained. He devoted himself to an attack on the credibility of the government's witnesses. As the case was presented to the jury by counsel, the real issue was the credibility of the government's witnesses, not the legal consequences of their testimony if it was believed.

In spite of the emphasis unnecessarily placed upon the presumption, we are convinced that the giving of these instructions, and counsel's argument were, in this particular case, harmless beyond a reasonable doubt. The only basis upon which the jury could have convicted was by believing the testimony of the three government witnesses as to the agreement that was reached at Feldstein's apartment, and as to what was done to carry it out. The jury could not have found possession if it did not believe the testimony showing that Feldstein supplied the money and the car, pursuant to the plan, and for the purpose of carrying it out, and thus, although he never left Los Angeles, was in sufficient control of the maneuvering of the three other conspirators, and particularly of Rosciano, to have constructive possession. This same evidence, if believed, as it must have been for the jury to convict, also shows knowledge and intent on Feldstein's part that the marihuana would be acquired in Mexico,

would be smuggled into the United States, and would then be concealed and transported in the United States. Thus the jury's finding of possession is necessarily based upon the identical testimony which unequivocally shows the requisite knowledge and intent, and so indicates to us that the result would have been exactly the same had the presumption instructions not been given or discussed, and that the error was harmless beyond a reasonable doubt.

2. **Other claimed errors.**

a. **Aiding and abetting an unconvicted principal; conspiring with unconvicted co-conspirators.**

Feldstein argues that he should not have been convicted of aiding and abetting where the alleged principal, Rosciano, was never tried. This is not the law. All that the prosecution need prove is that the offense has been committed. It is not even necessary that the identity of the principal be established, much less that he be convicted. See *United States v. Provenzano*, 3 Cir., 1964, 334 F.2d 678, 691; *Hendrix v. United States*, 5 Cir., 1964, 327 F.2d 971, 975, and the many cases there cited. Similarly, in the conspiracy charge, one can be convicted even though the indictment against all the other conspirators has been dismissed. Such conspirators need not even by charged. *Ng. Pui Yu v. United States*, 9 Cir., 1965, 352 F.2d 626, 633.

b. **Statements to undercover agent.**

Feldstein objects to the admission of the testimony of Bachrach, a government agent who talked to him while posing as a marihuana buyer. This was after Rosciano's arrest, but before Feldstein had been either charged or arrested. There was substantial evidence that the investigation had not even focused on Feldstein when Bachrach talked to him.

Although the conversation took place on January 28, 1965, three weeks after Rosciano was caught at the border, Bachrach testified that he knew nothing of that arrest, and had approached Feldstein for other reasons. The purpose of the meeting was to arrange a purchase of marijuana.

It is asserted that Bachrach should have warned Feldstein before talking to him. Reliance is on *Miranda v. Arizona*, 1966, 384 U.S. 436. The trial began in May of 1966, so that *Miranda* would not apply even if Feldstein had been in custody. Nor does *Escobedo v. Illinois*, 1964, 378 U.S. 478 apply; Feldstein was not in custody.

One cannot be an effective undercover agent if he must give warnings which inevitably disclose his identity. As we have several times held, a defendant is not entitled to an attorney while committing or arranging to commit a crime. Nor is he, in those circumstances, entitled to warnings. See *Garrett v. United States*, 9 Cir., 1967, 382 F.2d 768, 772; *Battaglia v. United States*, 9 Cir., 1965, 349 F.2d 556, 559; *Grier v. United States*, 9 Cir., 1965, 345 F.2d 523, 524. *Cf. Lewis v. United States*, 1966, 385 U.S. 206, 210; *Hoffa v. United States*, 1966, 385 U.S. 293, 303.

No other point raised merits discussion.

Affirmed.

Feldstein v. United States - No. 22,344

ELY, Circuit Judge (Dissenting):

I respectfully dissent. The majority holds that an error of constitutional dimension was, under *Chapman v. California*, 385 U.S. 18, 17 L.Ed.2d 705, 87 Sup.Ct. 824 (1967), harmless beyond a reasonable doubt. It does this while, at the same

time, forthrightly observing that the prosecution's appeal for conviction, in summation, was predicated, almost wholly, upon the proposition that the jury should apply the unconstitutional presumption. Feldstein never had actual possession of the marijuana, and I cannot believe that he was not prejudicially affected by the erroneous instruction and the prosecution's argument thereof. We learned, in *Wilson v. Anderson*, 379 F.2d 330 (9th Cir. 1967), *rev'd sub nom. Anderson v. Nelson*, 390 U.S. 523, 20 L.Ed.2d 81, 88 Sup.Ct. 1133 (1968), that it is a rare case indeed when error of constitutional magnitude can be held, beyond reasonable doubt, not to have prejudicially affected the rights of an accused.

Moreover, my examination of the instructions given to the jury in this case leads me to believe that the majority's conclusion cannot be reconciled with our court's recent opinion in *United States v. Christion*, ... F.2d ..... (9th Cir. May 14, 1970). See also *United States v. Mahoney*, ... F.2d ..... (9th Cir. May 12, 1970).

I would reverse.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on AUGUST 24th 1970, I served the within PETITION FOR WRIT OF CERTIORARI (FELDSTEIN v. UNITED STATES OF AMERICA) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR
U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on AUGUST 24th 1970, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Original copy fwded to Clerk, United States Supreme Court, via
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